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File No. 2013-SC-367

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COMMONWEALTH OF KENTUCKY — **APPELLANT**

v.

On Discretionary Review from Court of Appeals
File Nos. 2011-CA-956 and 2011-CA-957
Lawrence Circuit Court, Indictment Nos. 10-CR-111 and 10-CR-113

MICHAEL AND JANIE (CASTLE) YOUNG — **APPELLEES**

Brief for the Commonwealth

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CERTIFICATE OF SERVICE

I certify that the record on appeal has been returned to the Clerk of this Court, and that a copy of the Brief for the Commonwealth has been sent by mail to Hon. John David Preston, Judge, Judicial Center, 908 3rd Street, Suite 217, Paintsville, Kentucky 41240; by e-mail to Hon. Anna Deskins Melvin, Commonwealth's Attorney, and sent by Messenger Mail to Hon. Roy A. Durham, II and Hon. Karen Shuff Mauer, Assistant Public Advocates, 100 Fair Oaks Lane, Suite 302, Frankfort, Kentucky 40601, Counsel for Appellees; this 18th day of June, 2014.

Perry T. Ryan

Perry T. Ryan
Assistant Attorney General

INTRODUCTION

The appellees, Michael and Janie (Castle) Young, both entered conditional guilty pleas to theft by deception over $10,000 in value and were sentenced to imprisonment for five years, to be probated for five years. By a majority of two judges, the Court of Appeals reversed their convictions, ruling that the money which the victims had given to them should be considered merely a gift.

STATEMENT CONCERNING ORAL ARGUMENT

The Commonwealth does not request oral argument because the issues are plainly set forth in the briefs of the parties.

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STATEMENT OF THE CASE

This is a theft by deception case against the appellees, Michael Young and Janie (Castle) Young. On March 9, 2010, Tracey Scholen[1] reported to the Kentucky State Police that she and her husband, Jeff Scholen, had an arrangement to adopt the unborn child of Michael and Janie Young. (Michael T.R., pp. 16, 18; Janie T.R., pp. 16, 18). The Scholens had previously adopted a child from the Youngs without any problems. (Michael T.R., p. 18; Janie T.R., p. 18). Tracey Scholen reported that at the time of the second arrangement, the subject of this case, she was unaware that the Youngs had simultaneously arranged with Act of Love Adoptions of Boston, Massachusetts, to place the unborn child for adoption through that agency. (Michael T.R., p. 18; Janie T.R., p. 18). Janie Young did not disclose to the Scholens that in September, 2009, she had contacted Act of Love Adoptions about putting the child up for adoption. (Michael T.R., p. 21; Janie T.R., p. 21). Apparently, Ms. Scholen first learned about the arrangement with Act of Love Adoptions in a voice mail message left by Janie Young on February 1, 2010 — after the Scholens had already provided thousands of dollars to the Youngs. (Michael T.R., p. 22; Janie T.R., p. 22).

During the Kentucky State Police investigation, Det. James Goble documented that between October, 2009, and February, 2010, the Scholens had provided the Youngs $6,002.99 for prenatal expenses, paid $1,000.00 to the Young's attorney, Wave Towns, and paid $974.00 to the Scholens' counsel, Claiborne, Outman and

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[1]The Kentucky State Police documents in this record, including a note from the victims, their financial records and legal billing, indicate that their surname is "Scholen." This name is misspelled in the indictment and trial court orders. The Court of Appeals opinion also misspelled the name as "Scholan." Unless quoting a document, the Commonwealth will spell the name as "Scholen."

Surmay, P.C., for a total of $7,976.99. (Michael T.R., pp. 18-19; Janie T.R., pp. 18-19). Simultaneously, between October of 2009, and February of 2010, Act of Love Adoptions provided the Youngs $4,000.00, as reflected below:

FUNDS PROVIDED BY ACT OF LOVE ADOPTIONS

Check No.	Date	Payee	Amount
193309	10/16/2009	Janie Castle	$700.00
193421	10/21/2009	Janie Castle	$700.00
193815	11/11/2009	Janie Castle	$200.00
194160	11/30/2009	Janie Castle	$800.00
194503	12/18/2009	Janie Castle	$800.00
195127	02/01/2009	Janie Castle	$800.00
Total			$4,000.00

(Michael T.R., pp. 21-23, 88; Janie T.R., pp. 21-23, 88).

The combined amount which the Youngs received from both the Scholens and Act of Love Adoptions amounted to $11,976.99.

The Scholens did not adopt the Youngs' child. The Youngs kept the child, stating that the new baby was a girl and that they already had three boys. (Michael T.R., p. 20; Janie T.R., p. 20; VR: 02/11/11; 11:18:20-11:18:30).

Indictments and Guilty Pleas

On December 10, 2010, the grand jury indicted Michael Young for theft by deception over $10,000,[2] a class C felony, and for being a persistent felony offender in the first degree. (Michael T.R., pp. 1-2). The grand jury also indicted his wife, Janie Young, for theft by deception over $10,000.00 and for being a persistent felony offender in the second degree. (Janie T.R., pp. 1-2).

The theft by deception indictment against Michael Young stated:

> The Grand Jury charges: That on or before March 9th, 2010 in Lawrence County Kentucky, and before the finding of the indictment herein, the above-named defendant:
>
> 1. Michael Young alone or in complicity with Janie Young committed the offense of Theft by Deception Over $10,000.00 by knowingly and unlawfully engaging in a scheme to defraud Tracy and Jeff Scholan of money in excess of $10,000.00, by placing their unborn child for adoption to the Scholan Family and receiving from the Scholan family money for the upkeep of the mother during her pregnancy, without disclosing that they had placed the child for adoption through a second agency to another couple.

(Michael T.R., pp. 1-2). The indictment against Janie Young was similarly worded.

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[2]As previously noted, the combined amount which the Youngs received from both the Scholens and Act of Love Adoptions amounted to $11,976.99. In his brief to the Court of Appeals, Michael Young raised the issue of whether the amount exceeded $10,000.00. The Court of Appeals ruled the issue was moot. (Slip Opinion, p. 6). The Youngs did not file motions for cross-discretionary review under CR 76.21, so the issue, now abandoned, is not properly before this court. Nonetheless, if a defendant engages in a scheme of deception, the separate amounts of separate things of value obtained may be aggregated to reach a statutorily-prescribed threshold for conviction of theft by deception. Smith v. Commonwealth, 818 S.W.2d 620 (Ky.App. 1991).

(Janie T.R., pp. 1-2).

On February 2, 2011, the Youngs filed a motion to dismiss the indictment, arguing that the money given from the Scholens to the Youngs was a gift and that legal action by the prosecution sought to enforce an illegal contract to sell a child, a practice prohibited by KRS 199. 590(2). (Michael T.R. pp. 186-87; Janie T.R., pp. 187-88; VR: 02/11/11; 11:17:20-11:25:38). The trial court denied the motions to dismiss. (VR: 02/11/11; 11:25:15; Michael T.R., pp. 208-10; Janie T.R., pp. 206-08). The trial judge stated in his order denying dismissal:

> After reviewing the stipulated facts and considering the arguments of both sides the Court comes to the following conclusions. The Defendants are correct in that the alleged victims could expect nothing in return for the money they were providing. In sum, any money provided by the prospective adoptive parents to the defendant mother was a gift. However, the Court OVERRULES the Defendants motion to Dismiss because the acts of the Defendants in failing to disclose materially relevant information concerning the prospective adoption was substantial and would in and of itself provide for prosecution under KRS 514.040.

(Michael T.R., p. 210; Janie T.R., p. 208).

The Youngs both entered conditional guilty pleas under RCr 8.09 to the charge of theft by deception over $10,000, reserving the right to appeal the issues raised by their motions to dismiss. (VR: 04/8/11; 9:45:59-9:48:01; Michael T.R., pp. 200-03; Janie T.R., pp. 198-201). In accordance with the plea agreements, the trial judge sentenced them to imprisonment for five years, probated for five years, and the persistent felony offender counts against both Michael and Janie were dismissed. (VR: 05/13/11;

10:03:20; Michael T.R., pp. 211-14; Janie T.R., pp. 209-12).

The parties[3] stipulated facts, which were included in an order signed by the trial judge at the time of the guilty plea, as follows:

STIPULATED FACTS

1) At some point in the later part of 2009, Janie Young, had become pregnant with the child of her husband Michael Young.
2) Tracy and Jeff Schloan, paid the Defendants, Michael Young and Janie Young expense reimbursement money for the upkeep of Janie Young during her pregnancy in the anticipation that the Defendants would allow the Schloans to privately adopt the child once born.
3) Jeff and Tracy Schloan had previously adopted a child from Mr. and Mrs. Young.
4) The Defendants had also been accepting expense money from the Acts of Love Adoption Placement agency prior to accepting expense money from Tracy and Jeff Schloan. The Love Adoption Placement agency also provided the money with the anticipation that the Defendants would allow one of its parents to adopt the child through the agency.
5) The Defendants received amounts in excess of $10,000.00 from both parties combined, but received less than $10,000 from each individual party.
6) The Defendants did not disclose to both the Schloans and the Love Adoption Placement agency that the Defendants were receiving expense money from each of them at the same time. However, Janie Young did inform the Schloans that she had previously accepted money from the Love Adoption Placement agency and the two had discussed the Schloans paying it back.
7) If the fact that the Acts of Love Adoption Placement agency had been providing expense money to the

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[3]To clarify, although the stipulations were signed by the trial judge, they were not signed by the Commonwealth's Attorney or by defense counsel. (Michael T.R., pp. 208-10; Janie T.R., pp. 206-07). The Commonwealth does not dispute that it agreed to the stipulations.

Defendants at the same time as the Schloans had been disclosed to Tracy and Jeff Schloan, the Schloans would have considered this a material issue and would not have provided any more expense money to the Defendants.

8) That the Defendants were under no legal obligation to allow either the Schloans or someone acting through the Act of Love Adoption Placement agency prospective parents to adopt the child in question.
9) The Act of Love Adoption Placement agency admitted that they cannot enforce any agreement entered into between the birth parents and the adopted parents to adopt a child.
10) The Act of Love Adoption Placement agency admitted that any expenses paid on behalf of the birth parents were not in any way be contingent upon Defendants decision to place their child up for adoption or to allow their child to be adopted.
11) The Act of Love Adoption Placement agency never informed Michael and Janie Young that they could not except [sic] expenses from anyone else.
12) The Schloans never informed the Defendants that they could not except [sic] expenses from anyone else. It was not discussed.
13) The attorney interviewing Mike and Janie Young for the possibility of placing their child up for adoption the attorney for Act of Love Adoption Placement agency stated that she "did not feel it is a strong case. I don't sense an intentional scam, just no strong commitment either."
14) It is illegal to purchase a child for adoption and to pay money for the promise of being able to adopt a child.
15) Courts cannot enforce illegal contracts.
16) The Defendants were under no legal obligation to allow the Schloans to adopt the child, and the Court had no ability to enforce or would have no ability to enforce any agreement between the parties as it relates to the adoption of the child.

(Michael T.R., pp. 208-10; Janie T.R., pp. 206-07).

What was not stipulated was as important as what was stipulated. For

example, there was not stipulation that either of the Youngs had notified Act of Love Adoptions about their arrangement with the Scholens. There was no stipulation that the Youngs disclosed to the Scholens that they had continued to receive funds from Act of Love Adoptions. In sum, the Youngs continued to receive funds from both sources, the Scholens and Act of Love Adoptions. There is no reason to believe that either source would have continued to provide these funds if either had known or realized that another source was providing funds.

Based upon their conditional guilty pleas, the Youngs directly appealed the trial judge's pretrial orders to the Kentucky Court of Appeals. (2011-CA-956 and 2011-CA-957). On May 3, 2013, in a to-be-published opinion, a two-judge majority[4] of the Kentucky Court of Appeals reversed and remanded Youngs' convictions, ruling the Youngs had committed no crime. On April 9, 2014, this court granted the Commonwealth's motions for discretionary review. (2013-SC-367).

Additional facts will be developed in this brief as necessary.

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[4]Judge Stumbo and Judge Caperton concurred. Judge Dixon dissented without opinion.

ARGUMENT

I.

THE ELEMENTS OF THEFT BY DECEPTION WERE PRESENT IN THIS CASE, AND THE TRIAL COURT DID NOT ERR BY REFUSING TO DISMISS THE YOUNGS' CASE.

The Youngs pleaded guilty to theft by deception after being charged in the indictment with acting "alone or in complicity with" one another and "knowingly and unlawfully engaging in a scheme to defraud Tracey and Jeff Scholen of money in excess of $10,000.00, by placing their unborn child for adoption to the Scholen family and receiving from the Scholen family money for the upkeep of the mother during her pregnancy, without disclosing that they had placed the child for adoption through a second agency to another couple." (Michael T.R., pp. 1-2; Janie T.R., pp. 1-2).

On February 2, 2011, the Youngs filed a motion to dismiss the indictment, "as grounds stat[ing] that any money that allegedly may have been received . . . amounted to a gift" and that no crime occurred. (Michael T.R., pp. 187-88; Janie T.R., pp. 186-87). On May 20, 2011, the trial judge denied the motion to dismiss, ruling as follows:

> After reviewing the stipulated facts and considering the arguments of both sides the Court comes to the following conclusions. The Defendants are correct in that the alleged victims could expect nothing in return for the money they were providing. In sum, any money provided by the prospective adoptive parents to the Defendant mother was a gift. However, the Court OVERRULES the Defendants['] motion to Dismiss because the acts of the Defendants in failing to disclose materially relevant information concerning the prospective adoption was substantial and would in and of itself provide for prosecution under KRS 514.040.

(Michael T.R., p. 208; Janie T.R., p. 210).

The Commonwealth will first note that the Youngs' motions to dismiss placed the trial judge in a difficult procedural position. RCr 8.09 states, "a defendant may enter a conditional plea of guilty, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified trial or pretrial motion." The Kentucky appellate courts have repeatedly ruled that there are limited instances when a trial judge may summarily dismiss a criminal indictment prior to trial. These instances "include the unconstitutionality of the criminal statute, prosecutorial misconduct that prejudices the defendant, a defect in the grand jury proceeding, an insufficiency on the face of the indictment, or a lack of jurisdiction by the court itself." Commonwealth v. Bishop, 245 S.W.3d 733, 735 (Ky. 2008). The Supreme Court of Kentucky "has consistently held that a trial judge has no authority to weigh the sufficiency of the evidence prior to trial or to summarily dismiss indictments in criminal cases ." Bishop, 245 S.W.3d at 735. The Youngs' argument, though framed as a motion to dismiss because their conduct was not criminal, amounts to nothing less than an attack on the sufficiency of the evidence. Kentucky law does not place trial judges in the position of conducting a mini-trial, and the Court of Appeals had even less ability to assess the evidence which would have been admitted at trial, had the defendants chosen to plead not guilty.

Nevertheless, the Commonwealth's evidence would have been sufficient to proceed to trial. According to Leslie W. Abramson, 10 Kentucky Practice, Criminal Practice and Procedure, § 6.25 (5th Ed. 2010), the basic principles of the Kentucky theft

laws partly include the following:

> A defendant is liable for theft by deception when he obtains property or services of another by deception with the intent to either deprive the victim or defraud, deceive or injury that person of the property or service. . . .
>
> A defendant's deception must cause the transfer of property or the performance of services. In any case, though, reliance by the victim is an essential part of theft by deception. . . .
>
> The Commonwealth must show that the defendant acted with the intent or purpose to deceive another. No jury instruction is necessary as to whether the defendant's intent may be inferred from his failure to perform a promise, because such an instruction would invade the province of the jury 'to weigh the evidence and draw their own conclusions.' Indeed, intent to deceive cannot be inferred from the fact that the defendant failed to perform a promise he made.
>
> A defendant can intentionally deceive another in several ways, any of which must relate to matters having pecuniary significance. First, he can create or reinforce a false impression as to law, value, intention or other state of mind. The defendant's belief that the impression is accurate, of course, negates his criminal intent. . . . Purposely creating or reinforcing the false impression, not the representations themselves, is the basis for criminal liability. A false impression is created when Jones sees a new hat he likes, takes the price tag off and substitutes a tag with a lower price, and pays the lower price. A false impression is reinforced, for example, by a buyer who knows that certain stones are diamonds but represents to the seller that the stones are glass, as the seller already believes. . . .
>
> A second way for a defendant to intentionally deceive is by preventing the victim from acquiring information which would alter or affect his judgment as to the transaction, e.g., concealment of relevant ownership or appraisal data. Third, a defendant may deceive by purposely failing to correct a false impression which he had earlier created or reinforced, i.e., he has a duty to correct the victim's false impression.

(Footnotes omitted.)

Professor Abramson correctly summarized the pertinent part of KRS 514.040, theft by deception, which states as follows:

> (1) A person is guilty of theft by deception when the person obtains property or services of another by deception with intent to deprive the person thereof. A person deceives when the person intentionally:
> (a) Creates or reinforces a false impression, including false impressions as to law, value, intention, or other state of mind; [or] . . .
> (b) Prevents another from acquiring information which would affect judgment of a transaction; . . .

The record in this case shows that the elements of theft by deception were present and supported the guilty plea and conviction of the Youngs.

Obtaining Money

The investigation showed that the Scholens provided the Youngs $6,002.99 for prenatal and living expenses, paid $1,000.00 to the Young's attorney, Wave Towns, and paid $974.00 to the Scholens' counsel, Claiborne, Outman and Surma, P.C., for a total of $7,976.99. (Michael T.R., pp. 18-19; Janie T.R., pp. 18-19). Act of Love Adoptions provided the Youngs $4,000.00 between October 2009 and February 2010. (Michael T.R., pp. 21-23; Janie T.R., pp. 21-23).

Deception-False Impression; Withholding Information

The Youngs obtained the money by deception by representing to the Scholens that they could adopt their child while knowing full well that the child could not be adopted by both the Scholens as well as the Act of Love Adoptions. The Youngs obtained the money from the Scholens during the pregnancy, which began in 2009 and

ended with the birth of the child on March 5, 2010. (Michael T.R., pp. 18-20; Janie T.R., pp. 18-20; Stipulated Facts, No. 1, No. 2, Michael T.R., p. 208; Janie T.R., p. 206). But before the Youngs took money from the Scholens, they were already accepting money from Act of Love Adoptions of Boston, Massachusetts. The Youngs did not disclose to both the Scholens and Act of Love Adoptions that they were receiving money from each of them at the same time. (Stipulated Facts, No. 4 and No. 6, Michael T.R., p. 206; Janie T.R., p. 208). The second sentence of No. 6 in the stipulations states, "However, Janie Young did inform the Schloans that she had previously accepted money from the Love Adoption Placement agency and the two had discussed the Schloans paying it back." (Michael T.R., p. 208; Janie T.R., p. 206).

After reading the second sentence of Stipulation No. 6, the Court of Appeals concluded:

> First, the Scholans knew that money had already exchanged hands between the agency and the Youngs when they provided them with support. Second, the Scholans were never guaranteed to be able to adopt the Youngs' child; therefore, there was no deception as to purpose of the funds. Furthermore, there is no law or agreement that required the Youngs to inform the Scholans of other adoptive parents they were considering and receiving money from. Finally, the Scholans did not make the monetary gifts contingent on the Youngs not contacting other potential adoptive parents or adoption agencies. Each and every one of these facts were stipulated to by the Commonwealth and result in the conclusion that there was no theft by deception or otherwise.

(Slip Opinion, pp. 5-6).

The Court of Appeals might have misapprehended a portion of the facts

because the opinion contains no discussion as to how the second statement in Stipulation No. 6 is explained by the KYIBRS KSP Report, filed by Kentucky State Police Detective Goble, which states as follows:

> After looking at the financial records, I listened to the voicemails from Janie Young to Mrs. Scholen. There were nine total messages left by Mrs. Young. The first message was left on February 24, 2010 at 1249 hours. In that message, Mrs. Young makes comments indicating guilt to Mrs. Scholen reference a second couple making arrangements to adopt the same child. She states she was sorry and made several comments about repaying the money to Act of Love Adoptions and allowing the Scholen's to adopt the child.
>
> The second message is left February 25, 2010 at 0728 hours. Mrs. Young explained she called Mary Murphy at Act of Love Adoptions and left a message stating she wanted to make arrangements to fix the problem. She said she was worried about Act of Love Adoptions reaction to the deception and felt they would press charges. She says she is having trouble sleeping and did not want to go to jail. I think at this point in time, Mrs. Scholen is still being lead to believe her family will be adopt the child from the Young's. All indications at this point are Mrs. Young is attempting to fix the problem with Act of Love Adoptions with the intention of allowing the Scholen's to adopt the child. She makes several statements in this message to invoke sympathy from Mrs. Scholen trying to portra[y] this act as a mistake.

(Michael T.R., p. 19; Janie T.R., p. 19). The Court of Appeals found that the Youngs disclosed the scheme to the Scholens. (Slip Opinion, p. 5). This conclusion appears to be erroneous because the time of the disclosure is important. As noted in the police report, Janie Young did not communicate the fact that they were receiving funds from Act of Love Adoptions until February 1, 2010. (Michael T.R., p. 22; Janie T.R., p. 22).

On February 25, 2010, Janie Young left another voice mail message that continued to deceive the Scholens by claiming that she would disclose the double funding to Act of Love Adoption and return the money which the agency had given — something which the Youngs never did. (Michael T.R., pp. 19, 51; Janie T.R., pp. 19, 51). Janie further deceived the Scholens by leading the Scholens to believe they could still adopt the baby. (Michael T.R., p. 19; Janie T.R., p. 19). The audio recordings of Janie Young's recorded voice mail messages would have been admissible to show both her knowledge and intent to deceive the victims. KRE 401; KRE 402; KRE 803; KRE 804. On March 7, 2010, Janie left another voice mail message telling the Scholens that she would become pregnant again and give the child to them for adoption. (Michael T.R., pp. 20-21; Janie T.R., pp. 20-21).

As reflected by both the stipulation and the case notes of Act of Love Adoptions, the Youngs did not notify Act of Love Adoptions that they were going to permit the Scholens to adopt the child. (Michael T.R., p. 208, No. 6; Janie T.R., p. 206, No. 6, pp. 49-52).

Even if the Court of Appeals correctly described the funds which the Scholens and the adoption agency provided to the Youngs as "gifts," that characterization is not material because KRS 514.040 forbids obtaining *any* property (even a gift) if the receiving party obtained the property by making false representations. Various courts have ruled that using deception to obtain a gift amounts to theft by deception. State v. Lobato, 611 N.W.2d 101 (Neb. 2000) (theft conviction where defendant obtained donations after falsely claiming to have cancer); Linne v. State, 674 P.2d 1345 (Alaska

App. 1983) (holding, "As long as the jury found that Linne obtained money from Baenen by means of deception — by creating or confirming a false impression that she did not believe to be true or by promising performance that she did not intend to perform — conviction would be justified regardless of whether Linne obtained the money as a gift, as a formal loan, or as an informal loan — one that did not meet all legal requirements of enforceability."). See also State v. Conley, 724 S.E.2d 163 (N.C.App. 2012).

Also irrelevant is the question of whether the arrangement might be characterized as "consideration" or a "contract." The Youngs failed to fully disclose the complete circumstances and failed to explain that they were not dealing exclusively with the Scholens. At the same time, they held out the possibility of adoption and took the Scholens' money, thereby creating a false impression that the Scholens were the only party being considered as potential adoptive parents. This impression was bolstered by the prior relationship between the parties, as the Scholens had previously adopted a child from the Youngs. (Stipulated Fact No. 3, Michael T.R., p. 208; Janie T.R., p. 206).

Significantly, if the Scholens had known that the Youngs were taking money from Act of Love Adoptions at the same time they took money from the Scholens, the Scholens would not have given any more money to the Youngs. (Stipulated Facts, No. 7, Michael T.R., pp. 208-09; Janie T.R., pp. 206-07). A jury may reasonably infer criminal intent from the evidence, even if circumstantial. Blades v. Commonwealth, 957 S.W.2d 246, 250 (Ky. 1998) and Dillingham v. Commonwealth, 995 S.W.2d 377, 380 (Ky. 1999). Likewise, a trial court should draw reasonable inferences from the record when ruling on a motion to dismiss and when accepting a guilty plea, and a reviewing

appellate court should draw reasonable inferences from the record when reviewing the ruling and the guilty plea. The court can reasonably infer that the Youngs knew that if they told the Scholens that they were taking money from two different sources, the money from the Scholens would dry up. That is why they did not tell either victim (i.e., either source of money) that someone else was providing funds. By keeping the double funding a secret, they deceived the Scholens into providing over $6,000.00. The Scholens would not have given money to the Youngs had they known that someone else was providing the same type of funding. The Youngs understood this and deceived the Scholens by creating a false impression as to possibility of adoption and by preventing the Scholens from acquiring information about the under-the-table dealings with Act of Love Adoptions.

Intent to Deprive

The Youngs intended to deprive the Scholens and/or Act of Love Adoptions of the money received from them. The crime of theft by deception requires that the offender have the intent to deprive at the time when the money is obtained. Martin v. Commonwealth, 821 S.W.2d 95, 97 (Ky. App. 1991). The Youngs repeatedly kept sums of money given to them over several months by the Scholens, while never disclosing that an agency representing other prospective adoptive parents was under consideration for adoption of their unborn child. The Youngs intended to obtain the money from the Scholens without giving them the exclusive and fair consideration for adoption that they knew the Scholens expected, and did keep that money, evincing their intent to deprive from the beginning.

Criminal intent may be inferred from the evidence. Anastasi v. Commonwealth, 754 S.W.2d 860 (Ky. 1988). The Commonwealth's theory was that the Youngs intended to maximize their intake of money by milking two sources. The record indicates that Janie Young told Act of Love Adoptions that her family had no money, that she really needed money, and that she had no heat and needed to pay for gas. The agency responded by sending money. (Michael T.R. 21-22, 127-30; Janie T.R., pp. 21-22, 127-30).

Janie Young left several voice mails for the Scholens. In a February 24, 2010 message, she referred to a second couple making arrangements to adopt the same child, that she was sorry and made comments about repaying the money to the agency and letting the Scholens adopt the baby. In another message on February 25, 2010, Janie Young said she was worried about the possible reaction by Act of Love Adoptions and feared they would prosecute. She said that she knew she had done wrong and wanted to correct the problem. She said she did not want to go to jail. (Michael T.R., p. 19; Janie T.R., p. 19). These content of these messages show that the Youngs were intentionally engaged in a scheme to defraud the Scholens under the guise of possible adoption, and that the Youngs knew that their behavior was wrong. Intent to deprive, defraud, or deceive may be inferred from the evidence. Caudill v. Commonwealth, 723 S.W.2d 881, 883 (Ky. 1986). The record in this case contains sufficient evidence to support a finding of intent to deprive from the beginning of Janie Young's pregnancy.

In summary, the elements of theft by deception were present in the Youngs' case, and supported their convictions by guilty plea for that offense.

II.

THE ADOPTION STATUTE FOUND AT KRS 199.590(2) DOES NOT CONTROL THIS CASE.

The Youngs cite KRS 199.590(2), concerning prohibited acts and practices in the adoption of children, which provides, "A person, agency, institution or intermediary shall not sell or purchase or procure for sale or purchase any child for the purpose of adoption or any other purpose, including termination of parental rights." The Youngs claim that if any money changed hands between the Scholens and the Youngs that was not considered to be a gift, it would be for an illegal transaction of buying a child, and that the courts cannot enforce such a transaction in a criminal case. The Youngs further claim that the Youngs were under no legal obligation to allow the Scholens to adopt their unborn child and that the money given by the Scholens was only a gift in hope that something good might happen, i.e., the adoption of the child.

The legislative intent of KRS 514.400 is to forbid and punish the intent to deceive to acquire property. The Commonwealth agrees that the parties could not contract to sell the unborn baby into an adoption arrangement. But the Commonwealth did not ask the trial court to enforce such a contract; the Commonwealth did not seek performance of the adoption. The Commonwealth would not have instituted criminal charges if the facts had merely shown that the Youngs had changed their minds. As noted in Argument I, although the two judge majority of the Court of Appeals described the funds given to the Youngs as a "gift," the characterization is immaterial because KRS 514.040 forbids a person from using deception to acquire any property, including a

gift. Instead, the Commonwealth instituted the prosecution of the Youngs because the Youngs held out the possibility of adoption in order to get money, while secretly and deceptively continuing to take money from another source for the same purpose even after deciding to not allow the child to be adopted.

The Youngs stipulated that, had the Scholens known that Act of Love Adoptions was also funneling money to the Youngs, they would have considered this a material issue and they would not have provided funds to the Youngs. This stipulation reflects the more than reasonable conclusion that the Youngs intentionally accepted funds from the Act of Love Adoptions on the sly as part of an intentional scheme to defraud the Scholens out of money.

The basis of the prosecution was not that the adoption did not take place, but that the hope of adoption was dangled in front of the Scholens as a ruse to cheat them out of money. The theft by deception was prior to and independent of the birth of the child, and that the Youngs had no obligation to allow the adoption is immaterial to the crime committed. The theft by deception conviction is to be analyzed based on KRS 514.040, and the Youngs' focus on KRS 199.590 is misplaced.

In Surrogate Parenting Associates, Inc. v. Commonwealth, 704 S.W.2d 209, 211 (Ky. 1986), the court stated, "There is no doubt but that KRS 199.590 is intended to keep baby brokers from overwhelming an expectant mother or the parents of a child with financial inducements to part with the child." KRS 514.040 is intended to keep an expectant mother from exploiting the righteous hopes of potential adoptive parents and scamming them out of money. It is the theft by deception statute that controls

this case and not the law dealing with adoption practices.

KRS 199.590(6)(a) states as follows:

> In every adoption proceeding, the expenses paid, including but not limited to any fees for legal services, placement services, and expenses of the biological parent or parents, by the prospective adoptive parents for any purpose related to the adoption shall be submitted to the court, supported by an affidavit, setting forth in detail a listing of expenses for the court's approval or modification.

Two Kentucky cases, Day v. Day, 937 S.W.2d 717, 719 (Ky. 1997) and R. M. v. R. B., 281 S.W.3d 293, 297 (Ky.App. 2009), have almost no applicability in the present case. The Youngs' case never made it to the stage of adoption proceedings. The Youngs' cases are criminal, theft by deception cases, controlled by KRS 514.040, not KRS 199.590(6)(a).

CONCLUSION

The Commonwealth respectfully prays this court to reverse the Court of Appeals and thereby affirm the Youngs' convictions in the Lawrence Circuit Court.

Respectfully submitted,

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